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Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

RODNEY J. BAKER
Chief Warrant Officer-2, U.S. Marine Corps,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent,

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF MILITARY APPEALS

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QUESTION PRESENTED

Whether due process requires that trial and intermediate appellate judges in a peacetime military felony case have the protection of a fixed term of office?

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IN THE
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OCTOBER TERM, 1986

No.

RODNEY J. BAKER
Chief Warrant Officer-2, U.S. Marine Corps,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF MILITARY APPEALS**

Chief Warrant Officer-2 Rodney J. Baker respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Military Appeals in this case.

OPINIONS BELOW

The decision of the United States court of Military Appeals (App. A) is reported at 23 M.J. 226 (C.M.A. 1986). The opinion of the United States Navy-Marine Corps Court of Military Review (App. B) is an unreported decision, *United States v. Baker*, No. 85 1486 (N.M.C.M.R. June 25, 1985). The decision of the United States Court of Military Appeals denying

Petitioner's petition for reconsideration (App. C) is reported at 23 M.J. 288 (C.M.A. 1986).

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on October 23, 1986. Petitioner filed a timely petition for reconsideration to that court, and the petition for reconsideration was denied on December 29, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp. III 1985).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides:

Amendment V: "No person . . . shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

OTHER PROVISIONS INVOLVED

Article 6(a) of the Uniform Code of Military Justice, 10 U.S.C. § 806(a)(1982), provides:

The assignment for duty of judge advocates of the Army, Navy, Air Force, and Coast Guard shall be made upon the recommendation of the Judge Advocate General of the armed force of which they are members. The assignment for duty of judge advocates of the Marine Corps shall be made by direction of the Commandant of the Marine Corps.

Articles 26(a) and (c) of the Code, 10 U.S.C. § 826(a) & (c) (1982), provide:

(a) A military judge shall be detailed to each general court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed for such courts-martial and for the persons who are authorized to detail military judges for such courts-martial.

* * *

(c) The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail in accordance with regulations prescribed under subsection (a) A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member and may perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with approval of the Judge Advocate General or his designee.

Article 66(a) of the Uniform Code of Military Justice, 10 U.S.C. § 866(a) (1982), provides:

Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than

three appellate military judges. . . . The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Military Review established by him. The chief judge shall determine on which panels of the court appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

STATEMENT OF THE CASE

On 14 and 18 September 1984, Petitioner was tried and convicted by a general court-martial on charges of consensual sodomy, forceable sodomy, fraternization, indecent assault and communicating a threat. He pleaded guilty to the charges and was sentenced to be confined for four years, forfeiture of all pay and allowances, and to be dismissed from the service. Confinement in excess of two years was suspended.

The judge who presided at Petitioner's trial was a Marine Corps officer assigned to judicial duties for no fixed term. Instead, in accordance with Article 26 of the Uniform Code of Military Justice, he served at the pleasure of the Judge Advocate General and was subject to transfer at anytime. The same is true of the three judges who sat on the Court of Military Review panel that decided Petitioner's case.

REASONS FOR GRANTING THE PETITION

This case raises one of the most fundamental open issues of constitutional law: whether due process requires that a judge in a criminal case have the protection of a fixed term of office. The trial and intermediate appellate judges who sat in Petitioner's

case had no such protection. As a former judge of the Court of Military Appeals has written, "a military judge, whether at the trial level or on the bench of a Court of Military Review has no fixed term. He is subject to decertification as a judge or transfer to other duties at the discretion of the Judge Advocate General of his armed force." Cook, *Courts-Martial: The Third System in American Criminal Law*, 1978 So. Ill. U.L.J. 1, 17-18 (footnote omitted).¹

Each year, thousands of members of the armed services are tried by courts-martial presided over by such judges. Thousands of cases are reviewed by the four Courts of Military Review. During Fiscal Year 1984 (the last year for which published data are available), there were 12,009 general and special court-martial convictions and 9,053 decisions of the Courts of Military Review. 1984 *Ann. Rep. of Code Comm. on Military Justice* (1985). The Question Presented applies to each branch of the armed forces.

In addition, the issue posed in this case has potential implications for the administration of justice in those state court systems in which lower court judges, magistrates or justices of the peace serve at the pleasure of an appointed body or officer.² The only case

¹This case does not call upon the Court to address the sufficiency of the armed services' procedures for decertification of military judges; the Petition focuses only on military judges' exposure to transfer to other duties.

²See generally Fidell, *Judicial Tenure Under the Uniform Code of Military Justice*, 31 Fed. B. News & J. 327, 329 & nn. 23-24 (1984); L. Berkson, S. Beller & M. Grimaldi, *Judicial Selection in the United States: A Compendium of Provisions* 52 (Alas. magistrates), 76 (Ga. local courts), 105 (Mich. magistrates), 113 (Mo. probate court comm'rs), 142 (Okla. spec. judges), 148 (Pitts-

in which this Court has been asked to examine the constitutionality of such appointments is *People v. Horan*, 192 Colo. 144, 556 P.2d 1217 (Colo. 1976) (en banc), *cert. denied sub nom. Wittenbrink v. Colorado*, 431 U.S. 966 (1977), where the petitioner had the right to a trial *de novo* on appeal from a municipal court the judge of which served at the pleasure of the city council.

In the military, in contrast, the accused has no right to a trial *de novo* on appeal. The Court of Military Review has fact-finding powers, and must be independently persuaded of the accused's guilt or innocence and the appropriateness of the sentence, but the judges of that court also have no protection in office.³

Untenured judges of the Courts of Military Review have determined that military accuseds do not possess a right under the Due Process Clause of the Constitution to have their cases decided at trial or on review by judges with life tenure of a specified term of

burg magistrates and traffic court judges), 155 (S.D. part-time magistrates) (Am. Judicature Soc'y 1980).

³The fact that the civilian judges of the Court of Military Appeals do have statutorily-fixed terms is immaterial. Unlike the Courts of Military Review, that court lacks the power to set aside a conviction or modify a sentence based on its independent assessment of guilt or innocence or sentence appropriateness. *United States v. Wilson*, 6 M.J. 214, 215 (C.M.A. 1979); *United States v. Leonard*, 22 M.J. 115, 116 (C.M.A. 1986) (Everett, C.J., concurring). Even if it had that power, the availability of an appellate stage that meets constitutional standards does not cure constitutional defects at earlier stages of the judicial process. *Ward v. City of Monroeville*, 409 U.S. 57, 61-62 (1972); *Callan v. Wilson*, 127 U.S. 540 (1888).

office.⁴ This conflicts, however, with decisions of several state courts that have invalidated arrangements under which judges lacked the protection of fixed terms. For example, in *Winter v. Coor*, 144 Ariz. 56, 695 P.2d 1094 (Ariz. 1985) (en banc), the Supreme Court of Arizona, albeit on state constitutional grounds, struck down an ordinance under which a magistrate served at the pleasure of the town council. See also *Municipal Court of Seattle ex rel. Tuberg v. Beighle*, 28 Wash. App. 141, 622 P.2d 405 (1981), *aff'd*, 96 Wash.2d 753, 638 P.2d 1225 (1982) (en banc) (invalidating summary removal of "pro tem" judges); *State ex rel. Morales v. City Commission of Helena*, 174 Mont. 237, 570 P.2d 887 (1977) (invalidating city commission's power to terminate at will police judge's appointment); cf. *In re Advisory Opinion (Chief Justice)*, 500 A.2d 1298 (R.I. 1985), 507 A.2d 1316 (R.I. 1986) (chief justice held not removable by simple vote of state legislature).

Due process requires a bench that is impartial and not subject to outside influence. Ordinarily, this doctrine comes into play where there are elements of

⁴The Court of Military Appeals denied in its entirety a petition for grant of review on this issue in a case decided by the Navy-Marine Corps Court of Military Review. *United States v. Bozin*, 22 M.J. 190 (C.M.A. 1986), *collateral review pending sub nom. Bozin v. Sec'y of the Navy*, Civil No. 86-1636 (D.D.C.). A petition for grant of review by the Court of Military Appeals has been filed in the Army case. *United States v. Durham*, No. 56,170/AR *pet. filed*, 23 M.J. 158 (C.M.A. September 24, 1986). The Air Force Court has held military accuseds do not possess a right to have their cases decided by untenured judges. *United States v. Rivera*, No. 24487 (A.F.C.M.R. May 24, 1985), *aff'd*, 23 M.J. 89 (C.M.A. 1986), *petition for cert. filed*, 55 U.S.L.W. 3495 (U.S. January 2, 1987) (No. 86-1086).

prejudgment or bias related to the particular case, issue or litigant. *E.g.*, *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971). In some instances, due process imposes obligations of a more structural nature, such as where compensation arrangements give the judge an incentive to convict, *Ward v. City of Monroeville*, *supra*, or to issue search warrants. *Connally v. Georgia*, 429 U.S. 245 (1977).

This case presents a structural issue. But that is not to say that it is a mere intellectual exercise. This Court correctly recognized in *Bowsher v. Synar*, 106 S.Ct. 3181, 3188-90 (1986), that the removal power renders the removable official subservient to the holder of the power. In the military context, the untrammelled power to reassign sitting judges to non-judicial functions casts a serious pall over the independence of the military trial and intermediate appellate benches. The gravity of this defect was revealed by a 1984 study performed by the Department of Defense. According to that study, 24% of the Navy military judges and 10% of its appellate judges were aware of instances in which a military judge was threatened with reassignment or actually reassigned because of his or her decisions. 3 Dep't of Defense, *Military Justice Act of 1983 Advisory Comm'n Rep.*, Pt II, § III, at 8 (table A) (1984). The percentage of Air Force military judges aware of such instances was higher than in any other armed force; 36% of the Air Force military judges and 33% of its appellate judges were aware of instances in which a military judge was threatened with reassignment or actually reassigned because of his or her decisions. While the survey also showed that cases of actual or threatened transfer were rare, widespread awareness of the

threat of transfer necessarily has a chilling effect upon judicial independence.

Were conditions such as these to prevail in the civilian courts, the threat to constitutional standards of due process would be self-evident. There is no reason, especially in peacetime, to apply a lower standard to the military by requiring its judges to serve without the modicum of independence that comes from a predetermined term of office.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES J. QUIGLEY
Lieutenant Commander
JAGC, U.S. Navy
Appellate Defense Counsel
Counsel of Record

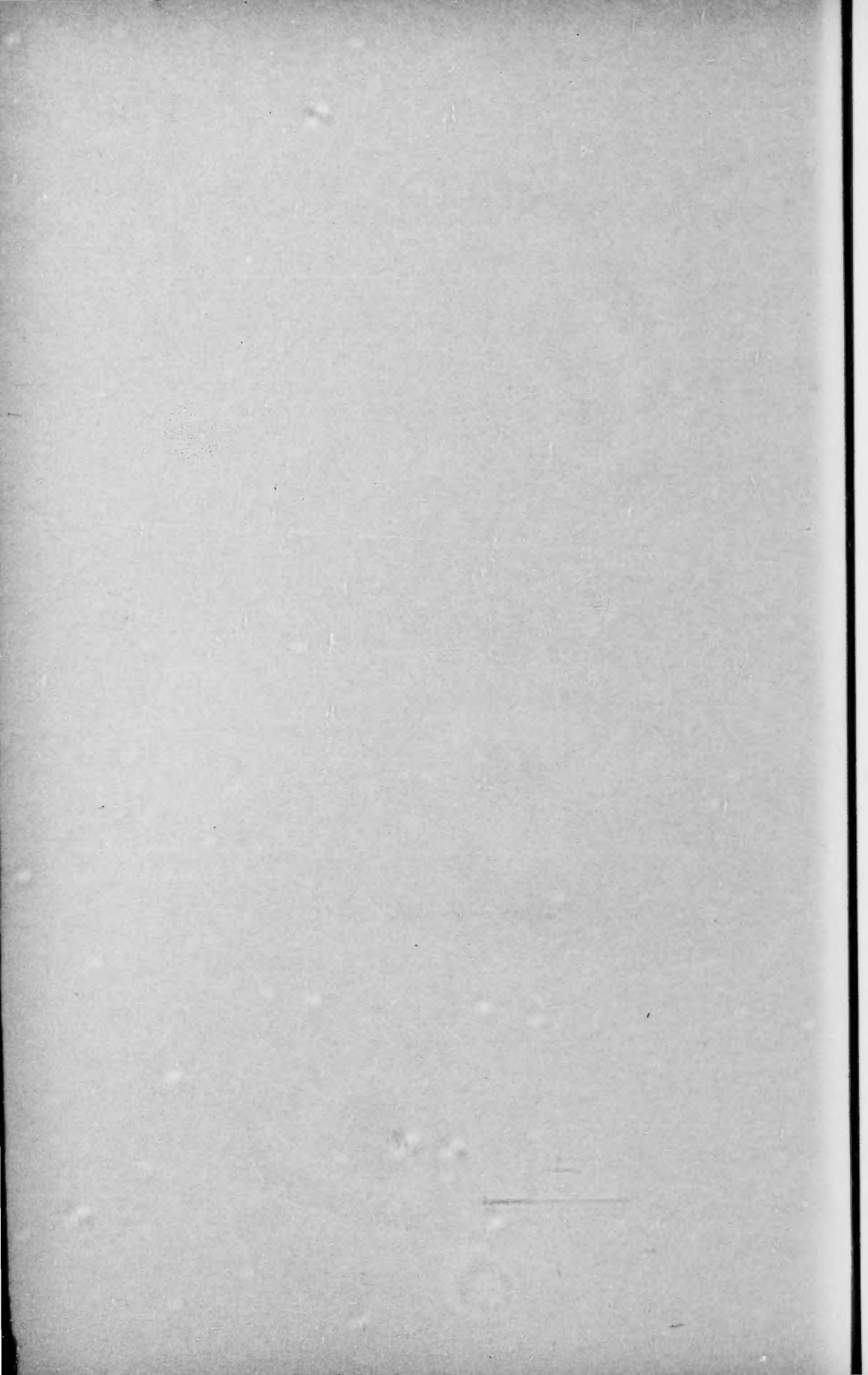
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APPENDIX



UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 54152/MC
CMR Dkt. No. 85-1486

UNITED STATES,

Appellee

v.

RODNEY J. BAKER (419-70-7810),

Appellant

ORDER

On further consideration of the granted issue (22 M.J. 342) in light of *United States v. Jefferson*, 21 M.J. 203 (C.M.A. 1986), and *United States v. Timberlake*, 18 M.J. 371 (C.M.A. 1984), it appears that specification 4 of Charge II (fraternization by committing sodomy) is multiplicitious for findings with specification 2 of Charge I (sodomy). However, we are satisfied that this multiplicity did not prejudice appellant as to sentence. Accordingly, it is by the Court this 23d day of October, 1986,

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Military Review is reversed as to specification 2 of Charge I; the finding of guilty thereon is set aside and that specification is dismissed; in all other respects the decision below is affirmed.

For the Court,*

/s/ JOHN A. CUTTS, III
Deputy Clerk of the Court

*Judge SULLIVAN did not participate.

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (VAN METER)
Appellate Government Counsel (UBERMAN)

**DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
290 STOVALL STREET
ALEXANDRIA, VA 22332**

**IN THE U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW
BEFORE**

J. J. GREGORY	C. H. MITCHELL	PHILIP C. BARR
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UNITED STATES

v.

RODNEY J. BAKER, 419 70 7810, Chief Warrant Officer
(CWO-2),
U.S. Marine Corps

NMCM 85 1486 DECIDED 25 June 1985
Sentence adjudged 18 September 1984
Review pursuant to Article 66(c), UCMJ

of General Court-Martial convened by Commanding General, 2d Force Service Support Group (Rein), FMF, Atlantic, Camp Lejeune, North Carolina 28542

MAJ Michael E. Canode, USMC, Appellate Defense Counsel, LT Gary K. Van Meter, JAGC, USNR, Appellate Defense Counsel, MAJ J. S. Uberman, USMC, Appellate Government Counsel

PER CURIAM:

We have examined the record of trial, the assignments of error, and the Government's reply thereto and have concluded that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Having considered the clemency petition filed by appellant's defense counsel, we conclude that no further clemency beyond that granted by the convening authority is war-

ranted. Accordingly, the findings and sentence as approved on review below are affirmed.

/s/ J. J. Gregory

J. J. GREGORY, Senior Judge

/s/C. H. Mitchell

C. H. MITCHELL, Judge

/s/ Philip C. Barr

PHILIP C. BARR, Judge,

UNITED STATES COURT OF MILITARY APPEALS
USCMA Dkt. No. 54152/MC
CMR Dkt. No. 85-1486

UNITED STATES,

Appellee

v.

RODNEY J. BAKER (419-70-7810),

Appellant

ORDER DENYING PETITION FOR RECONSIDERATION

On consideration of the appellant's petition for reconsideration of the Court's order dated 23 October 1986, it is by the Court this 29th day of December 1986,

ORDERED:

That said petition is hereby denied.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense counsel (AMPARO)
Appellate Government Counsel (UBERMAN)